



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 7906341

Date: MAR. 19, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner, an embedded software engineer working in the area of industrial automation and control, seeks classification as an alien of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner met the initial evidentiary requirements of at least three of the criteria listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 203(b)(1) of the Act makes visas available to immigrants with extraordinary ability if:

- (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
- (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
- (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation

at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate sustained acclaim and the recognition of his or her achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then he or she must provide sufficient qualifying documentation that meets at least three of the ten categories listed at 8 C.F.R. § 204.5(h)(3)(i) – (x) (including items such as awards, published material in certain media, and scholarly articles).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010)

II. ANALYSIS

The Petitioner is currently employed as a senior project engineer for [REDACTED], a manufacturer of [REDACTED] hardware and software. He earned a master's degree in electrical engineering from [REDACTED] State University in 2007.

A. Evidentiary Criteria

Because the Petitioner has not indicated or established that he has received a major, internationally recognized award, he must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). The Director found that the Petitioner met one of the evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), relating to his participation as a judge of the work of others in his field. On appeal, the Petitioner asserts that he also meets three additional evidentiary criteria. After reviewing all of the evidence in the record, we find that he does not meet the initial evidentiary requirement of at least three criteria.

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought. 8 C.F.R. § 204.5(h)(3)(iv)

The evidence establishes that the Petitioner served as a peer reviewer for the [REDACTED] [REDACTED] Symposium in 2017, reviewing several papers that were submitted to the conference. We therefore agree with the Director that he meets this criterion.

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media. 8 C.F.R. § 204.5(h)(3)(vi)

The Director found that while the evidence establishes that the Petitioner authored at least three scholarly articles, none were shown to have been published in a qualifying medium. However, in responding to the Director's request for evidence (RFE), the Petitioner submitted evidence that his poster was published in the proceedings of the "[REDACTED] World Congress on Alternatives & Animal Use in the Life Sciences." Upon review, we disagree with the Director and find that this evidence demonstrates that this scholarly article was published in a professional medium, thus satisfying the plain language of this criterion.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation. 8 C.F.R. § 204.5(h)(3)(viii)

In order to meet the requirements of this criterion, the Petitioner must demonstrate both that he played a leading or critical role, and that the organization or establishment for which that role was played is recognized as having a distinguished reputation. If a leading role, the evidence must establish that the Petitioner is or was a leader. A title, with appropriate matching duties, can help to establish if a role is or was, in fact, leading. If a critical role, the evidence must establish that the Petitioner has contributed in a way that is of significant importance to the outcome of the organization or establishment's activities. It is not the title of the alien's role, but rather the alien's performance in the role that determines whether the role is or was critical.

In his decision regarding this criterion, the Director acknowledged the reference letters from the Petitioner's employer, as well as evidence that he is listed as an inventor on multiple patent applications, but found that this evidence did not establish that his role was leading or critical for the employer as a whole. On appeal, the Petitioner specifically refers to a letter from his employer's vice president as acknowledging his contributions and leading role to the company. That letter, submitted in response to the Director's RFE, acknowledges that the task of writing a reference letter was delegated to the Petitioner's supervisor, and does not itself expand upon his leading or critical role.

The letter referenced in the vice president's letter was written by [redacted] Engineering Manager at [redacted] [redacted] writes that the Petitioner and his team "have spent the last five years developing a robust, high performance, and secure platform," and that "products driven by this platform were covered in 15 trade shows, 3 magazines, and 1000 customer evaluations." He also notes that the Petitioner then "led a second IO platform development effort" which received "a strong positive response from the [redacted] community around the world" in 2018. Further, [redacted] [redacted] mentions that the company's "next generation platforms have been widely promoted product lines."

Other reference letters in the record further explain the Petitioner's work on these products.¹ For example, [redacted] a retired senior principal engineer for [redacted] describes innovative features of the protocols developed by the Petitioner, noting that they are protected under a U.S. patent and pending Chinese and European patents. He also describes the Petitioner's leadership in the development of a "[redacted]" noting that the end result was "a key contributor to time to market and risk strategies in new product development."

The record also includes photographs of an "[redacted] Award" plaque given to the Petitioner in 2015 for "contributions to the [redacted] Protocol for [redacted] backplane," which is referred to in [redacted] letter. In addition, copies of patent applications listing the Petitioner as an inventor were submitted, as well as two letters notifying him of modest cash awards related to his work on these patents.

¹ We have reviewed all of the submitted reference letters in their entirety, including those not specifically mentioned in this decision.

While this evidence establishes that the Petitioner led a team of unspecified size and composition at [] and that [] has a distinguished reputation within the [] industry, it does not show that he acted as a leader for the overall organization, which the evidence indicates includes more than 22,000 employees. In addition, although he received recognition by [] for his work and was important to the development of the IO platform products, the evidence does not establish that the Petitioner's contribution was critical to []'s overall success or of significant importance to its overall activities. Other than confirming the fact that he received the [] Award, the evidence does not provide additional information about it such as the number of such awards granted by [] the scope of the award, or other contextual information to demonstrate the extent of this recognition within the company. Also, we note that the promotional information from [] shows that its products encompass multiple categories of software, hardware and devices, indicating that the Petitioner's work impacted a portion of those products. Further, [] Global Product Manager for this product line, repeats much of the same language included in []'s letter regarding promotional activities surrounding its launch, but the record does not include evidence to put these activities into context or otherwise support the overall criticality of the products to []'s activities. We therefore agree with the Director that this criterion has not been met.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field. 8 C.F.R. § 204.5(h)(3)(ix)

To satisfy the requirements of this criterion, the Petitioner must establish that his salary, or total remuneration, is high or significantly high, respectively, based on a comparison with others in his field in similar positions and geographic locations.² Although the Petitioner does not specifically assert that he meets this criterion on appeal, we note that the Director's decision did not address the Petitioner's claim to have a high salary in his RFE response. We will therefore consider the evidence relating to this criterion here.

The Petitioner submitted a printout, dated April 16, 2019, from what appears to be a third-party payroll website that shows a summary of his employer's "total annual investment." This includes a line item labelled "compensation," which includes a figure of \$122,864, as well as a total compensation, including "health & welfare" and "retirement," of \$143,737. However, the printout also includes a disclaimer stating that the third party "does not give any warranty or other assurance as to the content of the material appearing on the site, its accuracy, completeness, timeliness, or fitness for any particular purpose."

The Petitioner then compares this total compensation figure to the U.S. Department of Labor data for Electrical Engineers in the [] Ohio area at the Level 4, or fully competent, wage, stating that it exceeds that wage by 150%. We first note that the Occupational Employment Statistics (OES) data obtained from the FLCDatacenter.com website, from which the Petitioner obtained this data, does not include bonuses or benefits.³ Therefore, the appropriate figure for means of comparison to this wage

² See USCIS Policy Memorandum PM 602-0005.1, *Evaluation of Evidence Submitted With Certain I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14.* at 11 (Dec. 22, 2010), <https://www.uscis.gov/policymanual/HTML/PolicyManual.html>, noting that it is the petitioner's burden to provide geographical and position-appropriate evidence to establish that a salary is relatively high.

³ See the OES FAQ page at https://www.bls.gov/oes/oes_ques.htm, accessed on March 18, 2020.

is the “compensation” figure of \$122,864. Second, the Petitioner describes his position on Form I-140 as “embedded software engineer,” which is consistent with the description of his work elsewhere in the record. While the relevant wage in 2019 for electrical engineers was \$99,570, the wage for software developers, systems software (SOC code 15-1133) was \$105,248.⁴ Although the evidence indicates that the Petitioner’s salary is higher than both of these median wages, it does not sufficiently establish that it is high, as opposed to just above average, in comparison to others in the field. Accordingly, this criterion has not been met.

III. CONCLUSION

The Petitioner has not submitted the required initial evidence of either a one-time achievement or documents that meet at least three of the ten criteria. As a result, we need not provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119-20. Nevertheless, we advise that we have reviewed the record in the aggregate, concluding that it does not support a finding that the Petitioner has established the acclaim and recognition required for the classification sought.

The Petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields. USCIS has long held that even athletes performing at the major league level do not automatically meet the “extraordinary ability” standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm’r 1994). Here, the Petitioner has not shown that the significance and recognition of his work is indicative of the required sustained national or international acclaim or that it is consistent with a “career of acclaimed work in the field” as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); *see also* section 203(b)(1)(A) of the Act. Moreover, the record does not otherwise demonstrate that he is one of the small percentage who has risen to the very top of the field of endeavor. *See* section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(2).

For the reasons discussed above, the Petitioner has not demonstrated his eligibility as an individual of extraordinary ability. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.

⁴ Obtained from www.flcdcenter.com, accessed on March 18, 2020.